

167 FERC ¶ 63,021
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Alabama Municipal Electric Authority
Cooperative Energy

Docket Nos. EL18-147-000
ER19-1427-000

v.

Alabama Power Company
Georgia Power Company
Gulf Power Company
Mississippi Power Company
Southern Company Services, Inc.

CERTIFICATION OF SETTLEMENT

(Issued May 15, 2019)

TO THE COMMISSION:

1. On March 25, 2019, Southern Company Services, Inc., both for itself and on behalf of the respondents, Alabama Power Company, Georgia Power Company, Gulf Power Company, and Mississippi Power Company (collectively, Southern Companies), and the complainants, Alabama Municipal Electric Authority (AMEA) and Cooperative Energy (collectively, Settling Parties), filed a Settlement Agreement and explanatory materials in Docket No. EL18-147-000 (Settlement).¹ The Settlement establishes a refund effective date of May 10, 2018, and states that review of future modifications to the Settlement sought by non-Settling Parties shall be subject to “the most stringent standard permissible under applicable law.” The Settlement comprehensively resolves all issues set for hearing in the September 6, 2018 Commission Order on Complaint,

¹ The Settlement eTariff filing was assigned Docket No. ER19-1427-000. The eTariff filing includes a transmittal letter, Settlement Agreement, Joint Explanatory Statement in Support of the Settlement Agreement, and Certificate of Service. On April 1, 3, and 4, 2019, Cooperative Energy, Georgia Transmission Corporation, and AMEA each filed separate doc-less motions to intervene in Docket No. ER19-1427-000, respectively.

Establishing Hearing and Settlement Judge Procedures issued in Docket No. EL18-147-000 (Hearing Order).²

BACKGROUND/CASE SUMMARY

2. On May 10, 2018, AMEA and Cooperative Energy filed a complaint pursuant to sections 206 and 306 of the Federal Power Act (FPA) against Southern Companies, contending that updated financial data and the two-step discounted cash flow methodology no longer supports Southern Companies' stated 11.25 percent base return on equity (ROE) in each of Southern Companies' open access transmission tariff (Southern OATT) formula transmission rates, and is therefore unjust and unreasonable. More specifically, the complaint sought to reduce the base ROE to no greater than 8.65 percent and to require Southern Companies to provide refunds consistent with such a reduction.
3. On June 4, 2018, PowerSouth Energy Cooperative, Inc. and Mississippi Public Service Commission (MPSC) and the Mississippi Public Utilities Staff filed motions to intervene. On June 18, 2018, Georgia Transmission Corporation filed a motion to intervene.
4. Also on June 18, 2018, Southern Companies filed its answer to the complaint. AMEA and Cooperative Energy filed their answer to Southern Companies' answer on July 3, 2018.
5. The September 6 Hearing Order established a refund effective date of May 10, 2018, and established hearing and settlement judge procedures pursuant to section 206 of the FPA to determine all issues relevant to the determination of a just and reasonable base ROE raised in the complaint and answers.
6. On September 17, 2018, the Chief Administrative Law Judge (Chief Judge) issued an order granting the parties' September 12, 2018 joint motion requesting a thirty (30) day abeyance of formal settlement judge procedures to allow the parties to conduct informal settlement discussions and designated the undersigned as settlement judge. In response to the parties' October 17, 2018 joint status report, on October 22, 2018, the Chief Judge issued an order continuing to hold formal settlement judge procedures in abeyance for an additional thirty (30) days to allow the parties to continue informal settlement discussions. On November 21, 2018, the parties submitted a final joint status report in which they jointly moved to commence formal settlement judge procedures.

² *Ala. Mun. Elec. Auth. v. Ala. Power Co.*, 164 FERC ¶ 61,167 (2018).

7. The undersigned convened settlement conferences on December 18, 2018, and February 4, 2019. On March 25, 2019, the Settling Parties filed the Settlement Agreement.

THE SETTLEMENT AGREEMENT

8. The introductory paragraph of the Settlement states that the Settling Parties are authorized to represent that each party to this proceeding either supports or does not oppose the Settlement.

9. Article I describes the procedural background of this proceeding.

10. Article II provides that Southern Companies shall reduce the stated ROE to 10.60 percent (Settlement ROE), effective as of May 10, 2018. Refunds reflecting the reduction in the base ROE shall be made within sixty (60) days from the date that the Commission approves the Settlement without material condition or modification. The Settlement includes a five (5) year moratorium (measured from the date the Commission approves the Settlement without material condition or modification) that limits the ability of Southern Companies or any affiliate thereof to submit a section 205 filing to amend the Southern OATT formula rate, other than to reflect ministerial or compliance changes (including revisions to address certain Accumulated Deferred Income Tax (ADIT) matters). The moratorium also limits the ability of Southern Companies, AMEA, or Cooperative Energy or any affiliate thereof from submitting a section 206 filing to reduce the stated ROE. The moratorium shall not preclude the Commission, acting *sua sponte* or in response to a complaint, from instituting a section 206 proceeding concerning the Southern OATT formula rate, or the ROE component thereof. The Settlement clarifies that with respect to section 205 filings, nothing in the Settlement shall affect Southern Companies' obligation to comply with existing or future regulations. Further, the moratorium shall expire at the earlier of: (a) five (5) calendar years from the date the Commission approves the Settlement without material condition or modification; or (b) the date on which the Commission establishes a refund effective date pursuant to a section 206 proceeding regarding the Settlement ROE.

11. Article III states that the Settlement provisions are nonseverable.

12. Articles IV and V set forth several conditions of effectiveness. Among others, the Settlement shall become effective when approved or accepted by the Commission without material condition or modification in a final order. The Commission may condition its approval of the Settlement or require modifications thereto. However, if the Settling Parties do not accept the Commission's approval of the Settlement subject to condition or modification, the Settlement shall be null and void.

13. Article VI contains various reservations. Among others, it states that the Settling Parties shall not oppose filings required by and consistent with the Settlement. It also states that nothing in the Settlement shall affect any Settling Party's right to propose or oppose any particular ratemaking treatment, the prudence of any cost, or the justness and reasonableness of a proposed rate. Additionally, no Settling Party waives any claim or right which it may otherwise have with respect to any matters not expressly provided for in the Settlement. Additionally, the Settlement states that it does not establish any precedent, shall not be deemed a "settled practice," and shall not be admissible in any proceeding.

14. Article VII sets forth the standard of review. Specifically, it states that "[u]nless the Settling Parties otherwise agree in writing," a Settling Party's proposal to modify the Settlement shall be subject to the "public interest" application of the just and reasonable standard of review. Modifications proposed by a nonparty to the Settlement or by the Commission acting *sua sponte* shall be subject to "the most stringent standard permissible under applicable law."

15. Article VIII contains miscellaneous provisions. Specifically, it states that the Settlement constitutes the entire Offer of Settlement among the Settling Parties with respect to the subject matter addressed therein and supersedes any and all prior contemporaneous representations, agreements, instruments, and understandings among them. Additionally, the Settlement is submitted pursuant to the confidentiality provisions of Rules 602³ and 606.⁴ Further, each Settling Party shall not take any action inconsistent with efforts to file or obtain acceptance or approval of the Settlement, nor take any actions inconsistent with the Settlement provisions. The Settlement states that it is binding upon the Settling Parties and their successors and assigns. It also sets forth the procedures to waive provisions of the Settlement. Finally, the Settlement states that it shall be deemed the product of each party and participant in this proceeding, and that no ambiguity in the Settlement shall be construed in favor of, or against, any such party or participant.

COMMENTS

16. On April 15, 2019, the Commission Trial Staff (Trial Staff) filed initial comments. Trial Staff states that although it does not support the Settlement ROE, it does not oppose certification of the Settlement because of various factors that contribute to the entirety of the Settlement. Trial Staff states that the Settlement eliminates litigation risk and

³ 18 C.F.R. § 385.602 (2018).

⁴ *Id.* § 385.606.

provides rate certainty by including a rate moratorium on Southern Companies' ability to submit a section 205 filing to amend its formula rate. Trial Staff also states that Southern Companies' commitment to fully address the impact of the federal income tax rate reductions (including flow back of excess ADIT to ratepayers) will provide economic value to ratepayers. Trial Staff also notes that Southern Companies' commitment to continue to comply with existing or future regulations (including 18 C.F.R. § 35.24 (2018) (Tax Normalization for Public Utilities)) allays its concerns regarding the rate moratorium.

17. Also on April 15, 2019, MPSC filed comments explaining its nonopposition to the Settlement. MPSC states that it does not oppose the Settlement because it was voluntarily agreed upon by the complainants and respondents, reduces the rate paid by ratepayers, and does not bar any other affected entity, or the Commission, from bringing a complaint of its own. MPSC states that the Settlement cannot adversely impact third parties unless the Settlement is inappropriately relied upon to determine an ROE in another proceeding, i.e., were treated as a precedent. MPSC states that the Settlement ROE "should not be used as precedent for any purpose, including for use as an input to a Risk Premium analysis in a litigated proceeding."

18. On April 23, 2019, Southern Companies, AMEA, and Cooperative Energy filed a joint limited answer in response to the April 15 comments of MPSC (Limited Answer). The Limited Answer clarifies that "[t]he Settling Parties did not intend, and specifically provided language in the Settlement Agreement to address their intent relative to, reliance on the settlement ROE by others, including for use as an input to a Risk Premium analysis in a litigated proceeding." The Limited Answer specifies that "[i]t is settled Commission practice that 'its settlement approval in no way establishes the justness and reasonableness of any rates.'"

19. No other comments were filed.

DISCUSSION

20. The Settlement would comprehensively resolve all issues set for hearing in the Hearing Order. It would impose a five-year moratorium limiting Southern Companies' ability to file to amend its base ROE for each of its transmission formula rates under section 205. The Settlement would modify and supersede all prior contemporaneous representations and agreements among the Settling Parties with respect to the subject matter addressed therein. The Settlement provides substantial benefits to ratepayers by reducing the base ROE from the Southern OATT-stated ROE of 11.25 percent to 10.60 percent—approximately a 0.65 percent reduction. Further, the Settlement appears to promote certainty for the Settling Parties and administrative efficiency for the Commission and Southern Companies.

21. Further, the Settlement provides that any modifications to the Settlement sought by any Settling Party shall be subject to the “public interest” application of the just and reasonable standard of review. It also provides that any modification proposed by other entities, including the Commission acting *sua sponte*, shall be subject to “the most stringent standard permissible under applicable law.”

22. The Settlement presents no issues of first impression, has no apparent Commission policy implications (except insofar as it proposes to condition the just and reasonable standard of review) and impacts no other pending Commission proceedings. The explanatory statement explains that “[t]he Settling Parties are unaware of any previous reversals on the issues involved.” After careful review of the Settlement and all comments, the undersigned finds the Settlement is uncontested, and appears to be just, reasonable, and in the public interest.

CERTIFICATION

23. In accordance with 18 C.F.R. § 385.602(g)(1) (2018), the following documents are certified to the Commission:

- a. The Settlement filed on March 25, 2019, including explanatory materials;
- b. Initial comments filed by the MPSC on April 15, 2019;
- c. Initial comments filed by Trial Staff on April 15, 2019; and
- d. The joint limited answer filed by the Settling Parties on April 23, 2019.

Stephanie L. Nagel
Settlement Judge

Document Content(s)

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